

October 27, 2003

BY ELECTRONIC DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation, Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338

Dear Ms. Dortch:

Almost 15 months ago, Verizon filed the above-captioned petition for forbearance pursuant to section 10 of the Communications Act of 1934, as amended (Act).¹ That petition asked the Commission to forbear from enforcing Verizon's unbundling obligations under section 271 for any network element that incumbent local exchange carriers were no longer required to unbundle pursuant to section 251(c)(3) of the Act. The petition essentially reargued the argument Verizon advanced in the *Triennial Review* proceeding that the section 271 checklist does not impose independent unbundling obligations applicable to the Bell Operating Companies (BOCs).² In its August 2003 order, the Commission squarely rejected that claim on the ground that "the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under section 251."³

¹ Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338 (filed July 29, 2002).

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand, 18 FCC Rcd 16978, ¶ 652 (2003) (FCC 03-36) ("*Triennial Review Order*").

³ *Id.* ¶ 653. The Commission docketed the Verizon Petition in the *Triennial Review* proceeding, CC Docket Nos. 01-338 and 96-98. As a result, Commission determinations in that docket are binding upon the Verizon Petition. Verizon was clearly on notice that its argument was undermined by the Commission's action – indeed, the Commission announced this very substantive decision (and therefore, the Commission's response to the basis for the Verizon Petition) in the February 20, 2003 *Triennial Review* News Release as well. "FCC Adopts New Rules for Network Unbundling Obligations of

Despite clear Commission statements on February 20, 2003 and in the August 2003 final *Triennial Review Order*, Verizon waited several months before filing a lengthy written *ex parte* submission in this proceeding in which it effectively recasts and narrows its petition by urging the Commission to forbear from enforcing Verizon's section 271 unbundling obligations with respect to broadband. Verizon bases this *ex parte* submission upon its erroneous reading of the *Triennial Review Order*.⁴ As further indication of Verizon's attempt to manipulate the statutory deadline, Verizon's nineteen-page submission did not become available to the public on the Commission's website until the afternoon of October 24, the last business day preceding the statutory deadline for Commission action in this proceeding.

In view of Verizon's unexplained (and inexcusable) delay in filing this *ex parte*, the Commission should simply give it no weight whatsoever in its deliberations in this proceeding. Permitting Verizon to unveil a new set of arguments so late in the proceeding clearly not only would deprive interested parties of a meaningful opportunity to respond to Verizon's meritless claims, but also would subvert the agency's ability to manage this proceeding in an orderly manner. As the FCC has recognized in other contexts, it is especially important that the Commission insist that an applicant in a proceeding subject to a statutory deadline present its complete case in a timely manner.⁵

Incumbent Local Phone Carriers," 2003 FCC LEXIS 858, Attachment to Triennial Review Press Release at 4 (Feb. 20, 2003). The Commission made essentially the same determination it had reached in the *UNE Remand Order* in November 1999 (made in CC Docket No. 96-98) and under which it has based *every single* grant of section 271 authority obtained by a BOC since the 1996 Act was enacted. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999).

⁴ See *Ex Parte* Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, CC Docket No. 01-338 (Oct. 23, 2003) (attaching document entitled "The Commission Should Forbear from Imposing Any Section 271 Unbundling Obligations on Broadband") ("Verizon Memo").

⁵ See, e.g., *Application by SBC Communications, Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶¶ 35-36 (2000); *Application by Verizon Virginia Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Virginia*, 17 FCC Rcd 21880, ¶¶ 18-20 (2002); *id.*, Separate Statement of Commissioner Kevin J. Martin at 4; *Application by Verizon New England, et al. for Authorization to Provide In-Region InterLATA Services in Rhode Island*, Separate Statement of Commissioner Michael J. Copps, 17 FCC Rcd 3300, 3449-50 (2002) ("late-filed evidence prejudices the ability of other parties . . . to evaluate an application").

The Commission in this case likewise should summarily reject Verizon's effort to recast its petition at the eleventh hour.⁶

Even if the Commission were to choose to consider the substantive claims advanced in the Verizon Memo, it is clear that Verizon's recast petition is as flawed as the original petition filed 15 months ago. Verizon's principal argument in support of its request for relief from its broadband unbundling obligations is that forbearance would eliminate a "present uncertainty" as to whether BOCs have a "stand-alone obligation" to provide access to those same broadband facilities under section 271.⁷ In fact, no such uncertainty exists. The Commission unequivocally concluded in the *Triennial Review Order* that the Act establishes an "independent and ongoing access obligation" for the BOCs to provide access to checklist items under section 271(c)(2)(B) that is separate and distinct from an incumbent LEC's unbundling duties under section 251.⁸ In reaching this conclusion, the Commission expressly ruled that under section 271's "competitive checklist," the BOCs must continue to "provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251.*"⁹ In short, any action by the Commission with respect to an incumbent LEC's obligation to unbundle access to broadband facilities under section 251 does not affect a BOC's unbundling obligation with respect to those network elements pursuant to section 271. Far from creating any new "present uncertainty," the Commission's *Triennial Review* interpretation of section 271 reiterated the interpretation of section 271 that had been clearly established before Verizon received interLATA approval in any state. Verizon knew these rules of the road when it filed and received approval for all of its section 271 applications.¹⁰

⁶ As discussed above, Verizon now appears to have recast its request for section 271 forbearance to center on broadband network elements that it is no longer required to unbundle under section 251(c)(3). Consequently, the Commission arguably has discretion to treat the October 23 submission as effectively a new request for forbearance that supercedes its July request and restarts the section 10 clock. *See 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058 at nn.76, 203, & 257 (2000) (refusing to consider several "emergency petitions" and "supplemental comments" filed approximately one year to 18 months after the deadline for comments where the Commission faced a statutory deadline, and instead deferring consideration of those pleadings to a later proceeding).

⁷ Verizon Memo at 2.

⁸ *Triennial Review Order* ¶ 654.

⁹ *Id.* ¶ 653 (emphasis added).

¹⁰ Moreover, Verizon's argument that the FCC's *Triennial Review Order* provides a new "uncertainty" with regard to Verizon's section 271 argument virtually admits that

In a related vein, Verizon erroneously claims that its obligation to offer unbundled access to broadband under section 271 somehow “compromise[s]” the Commission’s decisions affecting broadband under section 251(c).¹¹ Verizon’s view apparently is that the Commission intended in the *Triennial Review Order* to eliminate any incumbent LEC obligation to provide wholesale access to broadband and, consequently, Verizon should be relieved of its obligation under section 271 to do so. In fact, the plain text of the *Order* refutes this baseless claim.

Contrary to Verizon’s suggestion, the *Triennial Review Order* expressly contemplated that after modifying the section 251(c) unbundling obligations with respect to fiber subloops, incumbent LECs would make broadband service offerings available on a wholesale basis on just, reasonable and non-discriminatory terms and conditions:

we expect that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops. Of course, the terms and conditions of such access would be subject to sections 201 and 202 of the Act.¹²

Thus, the Commission clearly saw no inconsistency between its determinations regarding the unbundling of fiber network elements under section 251 and the incumbent LECs’ provision of broadband access in accordance with the requirements of sections 201 and 202. Similarly, the FCC’s section 251 unbundling conclusions plainly are not “compromised” by the BOCs’ continuing obligation to offer access to broadband under the same section 201 and 202 just, reasonable and non-discriminatory terms, pursuant to section 271.¹³ In fact, the Commission assumed that wholesale service offerings by

Verizon’s July 2002 Petition has been mooted. There is no metaphysical possibility that a July 2002 Petition could have any “uncertainty” that results from a Commission item that was issued in August 2003 and became effective in October 2003. As a result, the Commission should disregard Verizon’s arguments based upon the *Triennial Review Order*; alternately, the FCC has the discretion to treat Verizon’s submission effectively as a new request for forbearance, as discussed in note 6 above.

¹¹ See Verizon Memo at 1.

¹² *Triennial Review Order* ¶ 253. In so stating, the FCC expressly indicated that Verizon itself supported making available such wholesale broadband offerings. Verizon’s latest filing, however, appears to be the latest in a series of attempts to close its network to competitors.

¹³ Reliance on the FCC’s rulings in the *Triennial Review Order* should not be interpreted as agreement with that analysis, including the Commission’s view that the

incumbent LECs would continue even after an item is “de-listed” from section 251(c) requirements, albeit pursuant to a different legal standard.

Finally, Verizon argues that section 706 of the Act “all but compels forbearance” from any obligation under section 271 to unbundle broadband elements that are exempt from unbundling under section 251.¹⁴ To the contrary, section 706 is irrelevant to the scope of a BOC’s access obligations under section 271. In the *Triennial Review Order*, the Commission found that section 706 was relevant to its unbundling analysis under section 251 only because the “at a minimum” clause of section 251(d)(2) granted the FCC authority “to take Congress’s goals into account” in deciding which network elements must be unbundled.¹⁵ Section 271, however, does not contain an “at a minimum clause.” Indeed, section 271 explicitly prohibits the Commission from “limit[ing] or extend[ing] the terms used in the competitive checklist set forth in subsection (c)(2)(B).”¹⁶ Consequently, in contrast to its assessment of unbundling issues under section 251, the Commission is barred from weighing the goals of section 706 in enforcing a BOC’s obligations under the competitive checklist of section 271.¹⁷

Petitions for forbearance filed pursuant to section 10 of the Act must be decided within a mandatory statutory period. For the Commission to meet that deadline and serve the public interest, it is incumbent upon petitioners to spell out their arguments and rationale in support of forbearance concurrent with the initial petition. Permitting the filing of new requests for “relief” hours before the statutory deadline would make a mockery of Commission processes and pose serious legal, constitutional and administrative law issues.

In sum, the Commission should summarily reject this transparent attempt by Verizon to prejudice the rights of interested parties by filing this written *ex parte* shortly before the statutory deadline in a proceeding that has been pending for 15 months. Even

network elements specifically listed in section 271 are not themselves subject to the cost-based pricing standard of section 252.

¹⁴ Verizon Memo at 8.

¹⁵ *Triennial Review Order* ¶ 176.

¹⁶ 47 U.S.C. § 271(d)(4).

¹⁷ This discussion should not be read to suggest that the parties agree with the Commission’s assessment of unbundling issues under section 251 or its treatment of section 706 and 251(d)(2)’s “at a minimum” language. In fact, the parties believe the Commission erroneously relied solely on section 706 to grant broadband relief, thus disregarding its obligation to balance the Act’s twin goals of promoting competition and broadband deployment.

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if the Commission were to review the substantive claims of the Verizon Memo, as we have shown, they clearly lack merit and should be ignored.

Respectfully submitted,

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